



DEPARTMENT OF THE TREASURY
ALCOHOL AND TOBACCO TAX AND TRADE BUREAU
WASHINGTON, DC 20226

December 23, 2003

CC-77,227 AL:JNS

Mr. Marc E. Sorini
Attorney at Law
McDermott, Will & Emery
600 Thirteenth Street, N.W.
Washington, D.C. 20005-3096

Dear Mr. Sorini:

This is in reference to your letter, dated October 21, 2003, seeking correction or withdrawal of information set forth in TTB's recent notice of proposed rulemaking on flavored malt beverages and related proposals, Notice No. 4, 68 Fed. Reg. 14292 (March 24, 2003). The request was submitted on behalf of your client, Diageo North America, Inc. ("Diageo").

We have reviewed your request for correction of data. Essentially, you are disputing TTB's statement, in the preamble to Notice 4, that current labels on certain flavored malt beverage products may confuse consumers with respect to both the source and amount of alcohol in those beverages. You assert that Notice 4 violates the Information Quality Act (IQA) because it does not adequately ensure the quality of its assertions of consumer confusion and does not provide any supporting data for these assertions. Furthermore, you suggest that the information at issue is "influential" within the meaning of the OMB Guidelines, because the proposed rule, if adopted, would implement "sweeping changes" in Federal policy regarding flavored malt beverage products, and because the allegations of consumer confusion may influence state regulators, causing them to take regulatory action adversely affecting flavored malt beverages. Diageo accordingly requests that TTB either: (1) publish the data supporting Notice 4's assertions of consumer confusion, if any, and permit Diageo and the public the opportunity to submit comments on the data; or (2) withdraw those assertions.

For the reasons set forth below, TTB has concluded that the issues you have raised are inextricably linked to our ongoing rulemaking process with respect to flavored malt beverages. Because the Administrative Procedure Act (APA), 5 U.S.C. § 553, provides well-established procedures for obtaining, considering, and responding to comments from the public on proposed rules, we have concluded that it would be appropriate to address your concerns through those mechanisms, rather than the procedures provided by the

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IQA. Accordingly, we will consider your letter as a comment to our proposed rule on flavored malt beverages, and will respond to the issues you have raised in the preamble to any final rule on this matter.

Information Quality Act

Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001, Public Law 106-554, directed the Office of Management and Budget (OMB) to issue, by September 30, 2001, government-wide guidelines that "provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility and integrity of information (including statistical information) disseminated by Federal agencies." On September 28, 2001, OMB issued guidelines; revised final guidelines were published on February 22, 2002. See 67 Fed. Reg. 8452 (2002).

The law also requires Federal agencies to issue their own implementing guidelines, including administrative mechanisms that allow affected persons to seek and obtain correction of information maintained and disseminated by the agency, where such information does not comply with the OMB Guidelines. Finally, the law requires agencies to report periodically to OMB on the number and nature of complaints received by the agency, and how such complaints were handled.

In compliance with these requirements, both the Department of the Treasury and the Bureau of Alcohol, Tobacco and Firearms (ATF) published guidelines on information quality. See Subdivision of Treasury Information Technology (IT) Manual, Ch. 14: Information Quality ("Treasury Guidelines"), and Process for Requesting Correction of Information Disseminated by the Bureau of Alcohol, Tobacco and Firearms ("ATF Guidelines"). Both the Treasury and ATF Guidelines stress that the guidelines are not legally enforceable, and do not affect any otherwise available judicial review of agency action.

On January 24, 2003, as a result of the Homeland Security Act of 2003, certain functions of the Bureau of Alcohol, Tobacco and Firearms (ATF) were transferred to the Justice Department. A new Alcohol and Tobacco Tax and Trade Bureau (TTB) was formed to perform those functions retained by the Secretary of the Treasury.

Treasury Order No. 120-01 (Revised), published on January 24, 2003, provides that all administrative actions relating to the laws enforced by TTB that were completed by ATF on or before January 23, 2003, "shall continue in effect until superseded or revised." 68 Fed. Reg. 3583, 3584 (January 24, 2003). Accordingly, TTB continues to rely upon the published procedures of our predecessor agency, ATF, as well as the published procedures of the Department of the Treasury, in responding to requests for correction of information under the IQA.

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Applicability of Guidelines to Rulemaking Proceedings

Section 14.5.3(C) of the Treasury guidelines provides that in most cases, requests for correction of information contained in a notice of proposed rulemaking should be addressed through the rulemaking process. The guidelines provide as follows:

In some cases, a bureau may disseminate a study, analysis, or other information in connection with the issuance of a notice of proposed rulemaking or other action that involves well-established procedures for obtaining, considering, and responding to comments from the public. In most cases, comments concerning the quality of the disseminated information can be addressed through these procedures, such as by responding to a request for correction of the information in the preamble to a final rule. However, in unusual circumstances, it would be appropriate for a bureau to address such comments at an earlier time pursuant to these guidelines. For example, the procedures of these guidelines should be used if the commenter has shown a reasonable likelihood of suffering actual harm if the comment is not resolved before issuance of the final action and the bureau determines that resolving the matter pursuant to these guidelines will not unduly delay the final action.

After reviewing your petition, TTB has concluded that the "unusual circumstances" cited above do not apply to your request. TTB published the notice of proposed rulemaking on flavored malt beverages on March 24, 2003, and provided a 90-day comment period. That comment period was subsequently extended until October 21, 2003. Thus, interested parties, including your client, have been given ample time to comment on the proposed rule.

Your petition does not establish that your client has a reasonable likelihood of suffering actual harm if the issue is not resolved before the issuance of the final rule on flavored malt beverages. The notice simply proposes a rule; it does not in any way effect an immediate change in the way that flavored malt beverages are currently labeled, marketed or taxed. Any such change would come about only if and when the Bureau issues a final rule.

In order to meaningfully respond to your request, TTB must review and analyze the entire rulemaking record, including each public comment. To date, we have received approximately 15,000 comments in response to the flavored malt beverage notice. Clearly, the process mandated by the APA is appropriate for dealing with the concerns raised by your letter.

Accordingly, instead of responding to your request under the IQA, we will treat your letter as a comment on the proposed rule. Please accept our assurances that any final rule on this matter will address the issues that you have raised in your comment.

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If you wish to appeal our decision to handle your request through the rulemaking process established by the APA, you may file a written request for reconsideration within 35 calendar days of the date of this letter. The request should be submitted to the Chief Information Officer, Alcohol and Tobacco Tax and Trade Bureau, 650 Massachusetts Avenue, NW, Washington, DC, 20226.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "B1" or a similar stylized mark.

William H. Foster
Chief, Regulations and Procedures Division